Supreme Court, U.S.
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No. 92-566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARK BARNES,

Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS' WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY AND/OR WESCO DALLAS AND/OR WESCO, A DIVISION OF OR WHOLLY-OWNED SUBSIDIARY OF WESTINGHOUSE ELECTRIC CORPORATION

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QUESTIONS PRESENTED

1. Whether the limitation on removal contained in Article 28 U.S.C. § 1446(b) is a procedural requirement that can be waived under Article 28 U.S.C. § 1447(c) if not expressly raised in a motion to remand within thirty days after the filing of the notice of removal.

2. Whether the mere recital of general background facts in a Motion for Remand which indicated that the case had been pending for more than one year can somehow cure Petitioner's admitted failure to initially raise a waivable legal ground/assertion for remand.

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BRIEF OF RESPONDENTS' WESTINGHOUSE ELECTRIC CORPORATION, ET AL

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 962 F.2d 513, and is reprinted in Respondents' Appendix A. The orders of the United States District Court for the Northern District of Texas relevant to the subject matter of this proceeding are unreported and reprinted in Respondents' Appendices B, C and D, respectively.

STATEMENT OF THE CASE

Although Respondents agree generally with the procedural history of the case as outlined in Petitioner's Petition for Writ of Certiorari, Respondents do not agree with various statements and/or arguments raised in Petitioners' statement of the case.

Additionally, some of the factual background is incomplete. As such, Respondents would submit the following brief statement.

As noted by Petitioner, this is a diversity case which was originally filed in Texas state court in 1985 and thereafter removed to federal court on January 12, 1989, the latter date being within 30 days of the date on which the last non-diverse defendant had been dismissed. The removal occurred shortly after the relatively unpublicized passing of the Judicial Improvements & Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (signed into law on November 18, 1988) that, in part, amended 28 U.S.C. § 1446(b) to provide for a one year procedural limitation on the removal of actions based on diversity.

Within 30 days of the date of removal, Petitioner filed a Motion to Remand; however, Petitioner failed to plead or urge that, pursuant to the recent amendments to Title 28 U.S.C. § 1446(b), the case could not be removed on the basis of diversity jurisdiction more than one year after commencement of the action. Instead, Petitioner pled and argued only that Respondents had allegedly sought affirmative relief in the state district court after the case became removable but prior to removing the case to federal court. The federal district court below subsequently denied that Motion to Remand. (*See* Resp. App. D). Petitioner makes no complaint concerning that ruling.

Thereafter, the parties diligently pursued discovery and general pretrial activities in the federal forum for a period of almost two years in preparation for the final trial on the merits. At that point, on or about May 15, 1990, Respondents filed a Motion for Summary Judgment in the trial court seeking summary judgment in their favor as to all of Petitioner's claims against them based on the grounds that Petitioner's claims were barred by the applicable statute of limitations. Subsequently, after the parties had extensively briefed and argued the summary judgment motion, on the eve of a ruling on the Motion for Summary Judgment by the federal district court, and some 20 months after Petitioner filed

his first Motion to Remand, Petitioner filed a Second Motion to Remand, wherein he sought to raise, for the first time, the one year limitation.[1]

The federal district court held that the one year restriction on removal of diversity cases was a "defect in removal procedure" that must be raised by a motion to remand filed within 30 days from removal. (*See* Resp. App. C). Because Petitioner had failed to raise the issue in his initial Motion for Remand, the trial court denied the Second Motion to Remand. (*Id.*) Thereafter, on February 8, 1991, the district court granted summary judgment in favor of Respondents as to all of the Petitioner's claims against them. (*See* Resp. App. B).

Following an appeal to the Fifth Circuit Court of Appeals, the trial court's decisions relating to both Petitioner's Motion to Remand and Respondents' Motion for Summary Judgment were affirmed. (*See* Resp. App. A).

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[1]Although Petitioner entitled his motion a "Motion for Rehearing", it is clear from the pleading that it did not seek a "rehearing" on arguments previously raised but rather sought to raise new grounds as to why, in the Petitioner's opinion, the district court should remand the case. It is obvious that Petitioner styled his pleading as a Motion for Rehearing because he realized that he had not raised the one year limitation in his first Motion to Remand and that this new ground could not be raised beyond 30 days after removal.

Additionally, although Petitioner now argues that the district court noted that Petitioner had raised "the factual if not the legal basis for a remand" in his first Motion for Remand, that statement is somewhat misleading. At best, by outlining the dates of the events relevant to this proceeding, the district court noted in passing that the case had been on file for more than one year.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The Petition for Writ of Certiorari filed in this case fails to present any special or important reasons why this Court should review the decision of the Fifth Circuit Court of Appeals below.

First, the Fifth Circuit's interpretation of the effect of the one year limitation contained in § 1446(b) represents a clear and articulate interpretation of the statute, and the related provision contained in § 1447(c). Certainly the statutes do not reflect that the one year limitation in § 1446(b) should be treated as a jurisdictional bar.

Furthermore, there is no logical reason to treat the effect of the one year limitation on removal any differently from the 30-day limitation for filing a notice of removal. As even Petitioner concedes, the 30-day limitation is a procedural one and the failure to raise that issue in a Motion to Remand filed within 30 days from the date of removal waives any right to obtain a remand on that basis. Obviously Congress was aware of the judicial interpretation of the 30-day limitation and, accordingly, the fact that it made no distinction in the relevant statutes as to how the two limitations are to be applied strongly suggests that Congress intended for the one-year limitation to be treated similarly.

Moreover, the Fifth Circuit's interpretation of the statutes in question reflects a simplified and easily applied standard. To the contrary, if this Court were to accept the interpretation placed on the statutes by the Petitioner it would inject ambiguity into them, would lead to a myriad of problems in interpreting the statutes and would ultimately result in inconsistent decisions and correspondingly increased appeals.

The second reason for denying the Petition is that this case does not present a situation where the Fifth Circuit Court of Appeals has rendered a decision in conflict with a decision of

another United States Court of Appeals. The decision by the Fifth Circuit Court of Appeals below is in fact the only court of appeals decision expressly addressing this issue. Additionally, the decision is consistent with the only other opinion rendered by a United States Court of Appeals touching on this issue, that being the 11th Circuit Court of Appeals' opinion in *Wilson v. General Motors,* 888 F.2d 779 (11th Cir. 1989).

Furthermore, although several federal district courts have held, either directly or in dicta, that the one year limitation on removal may be jurisdictional, the better reasoned opinions of those courts that have addressed this issue are those which have determined that the one-year limitation is a procedural limitation and not a jurisdictional one. None of the decisions cited by Petitioner in support of his position were rendered after the opinion of the Fifth Circuit Court of Appeals in this case. Additionally, two of those district court opinions are from the 11th Circuit and presumably should and will be disregarded in light of the later issued opinion in *Wilson,* wherein the 11th Circuit clearly implied that the one-year limitation was procedural.

The third and final reason for denying the Petition is that the facts raised in this case are unique and it is unlikely that the situation presented by this case will re-occur with any frequency particularly in light of the Fifth Circuit's opinion on this issue. Furthermore, a remand in this case would be futile, given the fact that summary judgment was granted by the district court below based on the applicable state statute of limitations. There is every reason to believe that, even if remand was ordered, the state district court would reach the same conclusion.

For all of the foregoing reasons, Respondents respectfully contend that the Petition for Writ of Certiorari should be denied in its entirety.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF THE EFFECT OF THE ONE-YEAR LIMITATION PRESENTS A CLEAR AND ARTICULATE READING OF THE PLAIN LANGUAGE OF THE REMOVAL STATUTES

The more logical and reasonable interpretation of the effect of the one year limitation on removal contained in § 1446(b) is that reached by the Fifth Circuit in the case below, that being that the one-year limitation on removal is a procedural limitation and it must be raised in a Motion to Remand filed within 30 days of removal.

Not only is this the most logical reading of the plain wording of the relevant statutory provisions but it also presents a simplified approach in evaluating the effect of these statutes and is one that can be uniformly applied by the lower courts. On the other hand, the position proffered by the Petitioner would result in a situation encouraging contradictory and inconsistent results.

In the amendments to § 1447(c), Congress created a clear distinction between those matters which must be raised in a motion for remand within 30 days from the date of removal and those matters that do not. With regard to the former, Congress recited any "defects in the removal procedure", and Congress intended this to encompass a broad range of irregularities, including but not limited to, any failure to comply with any of the time limitations on removal. With regard to the latter, Congress limited it to circumstances demonstrating that the district court lacked subject matter jurisdiction. This latter category is very narrow and represents the only situation in which Congress believes that remand is required at any time the issue is raised, either by the parties or by the court *sua sponte*, regardless of whether the issue is raised within 30 days of the date of removal or not.

As amended in November 1988, § 1446(b) provides, in pertinent part, as follows:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b). In turn, § 1447 of Title 28, as amended in November 1988, provides in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c).

As the Fifth Circuit noted in its opinion below, there is a distinction between removal jurisdiction, on the one hand, and original or subject matter jurisdiction, on the other. *See Barnes v. Westinghouse Electric Corp.*, 962 F.2d 513, 516 (5th Cir. 1992). The reference to "procedure" in § 1447(c) is intended to refer to " 'any defect that does not go to the question of whether the case originally could have been brought in federal district court . . . .' " *Barnes*, 932 F.2d at 516. (quoting *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544 (5th Cir.) *cert. denied.*, U.S. 112 S. Ct. 430, (1991).[2]

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[2] Some of the issues raised in the *Baris* case are analogous to those raised herein. In that case, the Fifth Circuit Court of Appeals outlined its simplified approach in interpreting § 1447(c) as to what is meant by the phrase "procedural defect." Presumably in their Petition for Writ of Certiorari to this Court the plaintiffs in that cause argued that the Fifth Circuit's interpretation of § 1447(c) was

The one-year limitation is not determinative as to the issue of whether or not the case could have been originally filed in federal district court, rather it is merely a procedural limitation Congress has placed on the removal of cases from a state district court, not unlike the 30-day requirement for filing a notice of removal.[3] Respondents agree that the removal statutes should be strictly construed, however, Respondents contend that it is Petitioner who is attempting to expand the scope of § 1447(c) in arguing that the reference to subject matter jurisdiction should be broadly interpreted to include, among other things, a lack of removal jurisdiction. Extending Petitioner's argument out to its logical conclusion, one can argue that any problem in removal creates a lack of removal jurisdiction which in turn somehow creates a lack of subject matter jurisdiction. The exception would then swallow the rule.

Petitioner has "confused improper removal (i.e., lack of removal jurisdiction) with lack of original subject matter jurisdiction. The former is waivable . . . the latter is not." *Baris*, 932 F.2d at 1543-44. If Congress truly intended the one-year limitation to be a jurisdictional bar, it could have expressly done so in the statute.

Furthermore, if one analyzes the legislative history and the official commentary to § 1446(b), in conjunction with the official commentary to § 1447(c), it is evident that Congress intended the one year amendment to be procedural only. The pertinent parts of the official commentary to § 1447(c) read as follows:

> The change in subdivision (c) imposes a 30-day limit on the time the plaintiff has to move the federal court to remand

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in error. In denying the Petition for Writ of Certiorari in that case, assuming the issue was raised, it would appear that this Court implicitly rejected that argument.

[3] The pleadings on file at the time of removal demonstrate that this case could have been brought originally in federal court on the basis of diversity jurisdiction.

> a case after it has been removed from a state court *if the basis for the remand motion is a mere defect in the procedure used and the removal process, e.g., where the case was removed after the time allowed for it by subdivision (b) of Section 1446.*
>
> * * * * * *
>
> *If the defect goes to subject matter jurisdiction, as where a case was removed on the basis of diversity of citizenship and it turns out that complete diversity is lacking,* there is no time limit on the motion to remand. It can be made at any time. That was also the rule before the amendment.

28 U.S.C.A. § 1447(c) (Supp. 1991) (Commentary on 1988 revision).

This commentary is important in two respects. First, the last clause of the first paragraph notes that a defect in procedure specifically includes situations where a case was removed after the time period allowed by § 1446(b). The commentary is not limited to the 30-day removal limitation and as such unquestionably includes the one-year limitation. Certainly, the commentary easily could have distinguished the 30-day removal limitation from the one year limitation, or it simply could have referred to the 30-day limitation alone. Instead, the commentary made no such distinction but instead referred globally to the time limitations found in § 1446(b).

Additionally, in the latter paragraph, with regard to a defect of subject matter jurisdiction, the commentary refers only to a case removed on the basis of diversity of citizenship. Once again, that section also could have referred to the one year limitation. In fact, had this been the true intent of the provision, given that the one-year limitation was added by the 1988 amendments, the commentary should have referred to the one-year limitation.

Finally, and perhaps most importantly, it must be remembered that the 30-day time limitation on removal was contained in the original statute. In considering how an amendment adding a one year limitation would be interpreted, Congress was aware of the

judicial construction of the 30-day limitation. As even the Petitioner concedes, there is no doubt that the failure to remove a case within 30 days is a procedural defect which is waived if not raised in a motion for remand filed within 30 days following the filing of a notice of removal. *See e.g.* Petitioner's Brief at 11-12 n.6. ("[t]here is no doubt that the thirty-day deadline for remand motions applies *at least* to all removal challenges based on purely procedural defects, such as a failure to seek removal within thirty days after service of a state-court pleading that reveals a basis for removal ...."). *See Nolan v. Boeing Co.* 919 F.2d 1058, 1063 (5th Cir.), *cert. denied.*, U.S. , 111 S. Ct. 1587 (1991), 919 F.2d at 1063 n.6; *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980). *See also Grubbs v. General Electric Corp.*, 405 U.S. 699, 702-04 (1972). Knowing that the 30-day limitation was being treated as a procedural bar as opposed to a jurisdictional one, had Congress intended to create a distinction between the two, it would have expressly done so. Because Congress did not, there is a clear and unmistakable inference that Congress intended the courts to apply a similar interpretation to the one year limitation. There is no logical reason for treating these deadlines differently.

Petitioner's argument that the one-year limitation should be interpreted differently from the 30-day limitation is inherently contradictory. Petitioner wholly fails to explain why, on the one hand, the 30-day time period can constitute a "defect in removal procedure" but, on the other hand, the one-year limitation cannot. It is merely semantics to argue that the clause containing the one year limitation is not "phrased" in terms of the procedural obligations of the Respondents. In practical terms, it clearly does refer to the procedure for removing a case. Moreover, the effect of both provisions is the same. In conclusion, there is simply no support, either in the language of the statute or the legislative history, for the conclusion that the two limitations periods should be interpreted differently.

Accepting the Fifth Circuit Court of Appeals' interpretation of the phrase "defect in removal procedure" and its interpretation of the effect of the one-year limitation on removal actions would create a more simplified approach which could be uniformly applied by the lower courts who may ultimately address the issue. On the other hand, the approach suggested by the Petitioner would only lead to confusion and inconsistency.

Petitioner generally argues that the Fifth Circuit's interpretation of the phrase "subject matter jurisdiction" is too narrow and that it should be read broadly to include a number of other matters relating to removal jurisdiction, not the least of which is the one-year limitation on removal. In the alternative, Petitioner suggests that this Court should adopt the reasoning of the Third and Eighth Circuits in *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1215 (3d Cir.), *cert. denied,* U.S. , 112 S. Ct. 302 (1991), and *Melahn v. Pennock Ins., Inc.* 965 F.2d 1497, 1503 (8th Cir. 1992), respectively, wherein those courts concluded that, in their opinion, there are actually three categories of cases under Section 1447(c): (1) those presenting defects in the removal procedure; (2) those presenting a lack of subject matter jurisdiction; and (3) those presenting neither. These opinions fail to provide any real guidance as to the situations falling into each individual category and as such, the lower courts following those opinions are left with a very amorphous standard.

In practical terms neither of the options presented by the Petitioner provides any clarity or avoids the so-called confusion which Petitioner contends currently exists. Even if one assumes that there is some confusion in the lower courts as to how either § 1446(b) or § 1447(c) should be interpreted, this situation will not be resolved by adopting the Petitioner's argument; it will, in fact, only worsen the situation.

For example, if this Court determines that the one-year limitation somehow constitutes a jurisdictional bar, then numerous arguments will be raised by future litigants that other procedural

problems arising from the removal process, or related problems, also somehow constitute a jurisdictional bar, despite the fact that they do not affect subject matter jurisdiction. Aside from the fact that the lower courts will have no guidance as to how this new rule should be applied, it is obvious that inconsistent results will occur. Such a result would even be more likely if this Court adopted the alternative proposal of the Petitioner. The lower courts will then have to determine what constitutes a matter involving subject matter jurisdiction, what constitutes a matter involving a "defect in removal procedure" and what situations involve neither. Attempting to individually label and compartmentalize each distinctly different removal irregularity would result in confusion and would inspire increased uncertainty and resultant appeals. Litigants would be encouraged to create an unlimited array of innovative dissections/exceptions/interpretations of the language of the statutes to address every conceivable alleged deficiency in the removal process. This Court will then be faced with the prospect of deciding, on a case by case basis, issues involving every nuance of removal jurisdiction.

In sum, the position taken by the Fifth Circuit Court of Appeals is the most reasonable and logical interpretation of the statutory provisions in question. It presents a clear and unambiguous reading of the statute and it is supported by the legislative history. Furthermore, it is consistent with judicial interpretations of an analogous provision in the same statute, namely the 30 day limitation on removal actions. Finally, it presents a simplified approach that is easily applied by the lower courts and is one that avoids the inherent confusion and pitfalls that would exist if Petitioner's argument is accepted.

III. THE MORE AUTHORITATIVE AND BETTER REASONED OPINIONS EVALUATING THE EFFECT OF THE ONE-YEAR LIMITATION SUPPORT THE CONCLUSION THAT THE ONE-YEAR LIMITATION IS A PROCEDURAL BAR

A. The Fifth Circuit Opinion Is Not In Conflict With Any Other Circuit Opinion.

Only two circuit courts have even touched on the issue of whether the one-year limitation contained in § 1446(b) should be treated as a procedural limitation or a jurisdictional one and both have reached the same conclusion, that being, that it should be treated as a procedural limitation. The first case is, of course, the Fifth Circuit's opinion in this case. The second is the 11th Circuit Court of Appeals' opinion in *Wilson v. General Motors,* 888 F.2d 779 (11th Cir. 1989). Although admittedly not directly on point, in its opinion, the 11th Circuit Court of Appeals repeatedly refers to the newly created one-year limitation as a "procedural bar" only.

In *Wilson,* the plaintiff had filed suit in 1984 and the defendant thereafter removed the case to federal district court in 1986, immediately after it had learned that diversity jurisdiction then existed. The federal district court denied the plaintiff's motion to remand and the case proceeded to trial, eventually resulting in a final judgment on behalf of defendant. Plaintiff appealed on the sole ground the district court erred in denying her motion to remand.

In affirming the district court's judgment, the 11th Circuit specifically addressed the amendments to § 1446(b) regarding the one-year limitation on removals. In its analysis, the court repeatedly referred to the one-year limitation as a "procedural

change", thereby explicitly recognizing that the one-year limitation was not jurisdictional in scope. *Id.* at 781.[4]

Because there is no inconsistency in the courts of appeals regarding this issue, this case does not present compelling circumstances sufficient to justify granting the Petition for Writ of Certiorari.

B. The Clear Weight of Authority Has Concluded That The One-Year Limitation On Removal Is A Procedural Requirement

Although Petitioner argues that the majority of decisions on the issue in question favor his position, if one evaluates all of the opinions addressing the issue, it becomes apparent that the better reasoned and more authoritative opinions are those which have concluded that the one-year limitation is a procedural bar.

First, as noted above, only two circuit courts have either expressly or implicitly addressed this issue and both have concluded that the one-year limitation is a procedural bar. Second, there are a number of district court opinions also supporting this conclusion. *See e.g. Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543, 545 (N.D. Cal. 1989); *Leidolf v. Eli Lilly & Co.*, 728 F. Supp. 1383 (E.D. Wis. 1989).

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[4] For example, the following is an excerpt from the opinion of the 11th Circuit regarding the one-year limitation:

> GMC filed its removal petition more than one year after the commencement of the action but well before the enactment of Section 1016. One issue presented by this case is whether this *one-year procedural bar* applies retroactively in cases which have been removed and brough to final judgment before November 19, 1988, but which are still pending in federal appellate court. We hold that the *one-year procedural bar* does not require federal courts to remand such cases to the state courts.

Wilson, 888 F.2d at 780, 781 & n.1 (emphasis added).

The Fifth Circuit Court of Appeals and the court in *Wilson* both cited to the district court opinion in *Gray,* 711 F. Supp. 543. This is important because *Gray* faced an almost identical fact scenario as that presently before this Court and *Gray* concluded that the one-year limitation on removal was procedural and as such, could be waived if not raised within 30 days of the date of removal. A similar decision was reached by the court in *Leidolf,* 728 F. Supp. 1383.

With regard to the opinions cited by the Petitioner, those cases can be distinguished or are not persuasive in light of the other opinions and in particular, those of the Fifth Circuit Court of Appeals and the 11th Circuit Court of Appeals. The opinions cited by Petitioner are *Brock v. Syntex Lab, Inc.,* 791 F. Supp. 721, 722-23 (E.D. Tenn. 1992); *Perez v. General Packer, Inc.,* 790 F. Supp. 1464, 1469-71 (C.D. Cal. 1992); *McNaught v. Avis Rent-A-Car Systems, Inc.,* No. 91-C-0700, 1992 WL 1733 (N.D. Ill. January 2, 1992); *Foiles v. Merrell National Lab,* 730 F. Supp. 108, 109-11 (N.D. Ill. 1989); *Smith v. MBL Life Assurance Corp.,* 727 F. Supp. 609, 602-04 (N.D. Ala. 1989); *Strickland v. A.P. Propane, Inc.,* 721 F. Supp. 284, 285-86 (N.D. Fla. 1989).

It first should be first noted that none of these opinions was decided after the final decision in the Fifth Circuit Court of Appeals below. (The decision on rehearing in *Barnes* was issued on June 8, 1992; although also issued in 1992, the decisions in *Brock, Perez,* and *McNaught* were issued before then.) Second, two of these opinions are from the 11th Circuit, *Smith,* 727 F. Supp. 601, and *Strickland,* 721 F. Supp. 284, both of which were decided prior to the 11th Circuit Court of Appeals' opinion in *Wilson,* which implicitly if not expressly stated that the one year limitation was procedural. As such, those opinions are of questionable authority. (Although all three decisions were issued in 1989, the district court opinions were issued prior to *Wilson.*)

In addition, two of the cases cited by the Petitioner are from the same district, being the Northern District of Illinois and it is not surprising that they followed each other. Furthermore, the first of those opinions, *Foiles,* 730 F. Supp. 108, fails to provide any sufficient explanation as to why the one-year limitation on removal was placed in the section of the United States Code entitled "procedure for removal" if Congress truly intended the change to be jurisdictional. In fact, the court in *Foiles* recognized this as a "discordant note" to its conclusion that the one year time bar is jurisdictional. *See Foiles,* 730 F. Supp. at 111. This is even more important in that most of the later opinions cited by Petitioner relied on the decision in *Foiles* which simply is not supported either by the statute or the legislative history. Furthermore, the conclusion reached in one of the remaining decisions, *McNaught,* was dicta.

For all of these reasons, the weight of the well-reasoned authority supports the conclusion reached by the Fifth Circuit of Appeals that the one-year limitation is a procedural bar and not a jurisdictional one.

IV. THE FACTS OF THIS CASE DO NOT PRESENT REASONS TO JUSTIFY THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

The facts presented by this case are unique and it is unlikely that the situation presented by this case will re-occur with any frequency in the future. As noted above, this case was removed to federal court less than two months following the relatively unpublicized passage of the Judicial Improvements and Judicial Justice Act, which amended § 1446(b) to add the one year limitation on removal of actions. Of course, the statute has now been in effect for four years and there are two circuit court opinions uniformly resolving the issue presented with no subsequent opinion to the contrary.

Additionally, although Petitioner would have this Court believe that there is a widespread problem involving parties removing cases beyond the one-year limitation, that is not supported by the record. If the problem were as severe as Petitioner contends, then one would expect a substantial number of cases to have addressed this issue. Instead, only nine district courts (including the case at bar) have considered it and no district courts have done so subsequent to the opinion of the Fifth Circuit in the case at bar.

The situation certainly is not urgent as Petitioner contends. Respondents suggest that any subsequent courts which may face this issue, if any, will adopt the authoritative and more reasonable approach of the Fifth Circuit Court of Appeals. The issue has been resolved.

There is an additional reason why this particular case does not justify the granting of the Petition for Writ of Certiorari. As noted in the Statement of Facts above, following the denial of Petitioner's Second Motion for Remand, the district court granted summary judgment in favor of Respondents as to all of Petitioner's claims against them. That decision was affirmed by the Fifth Circuit Court of Appeals.

As this is a diversity case, the federal district court applied state law in evaluating the basis for summary judgment. The summary judgment below was based on the application of the 10-year statute of repose contained in § 16.009 of the Texas Civil Practices & Remedies Code which provides that any claim for damages against a person who "constructs or repairs improvements to real property" must be brought no later than 10 years after the substantial completion of that improvement. It is undisputed that the improvement upon which Petitioner's claims are based had been installed more than 10 years prior to the institution of the lawsuit and as such, because the Petitioner's claims were barred by the applicable statute, the district court granted summary judgment in favor of Respondents. The Fifth Circuit Court of Appeals agreed.

Even in the unlikely event this Court were to grant Petitioner's Petition for Writ of Certiorari and ultimately rule that the one-year limitation required a remand of the case to state court, Respondents would still be entitled to summary judgment, this time in the state district court. Petitioner could not demonstrate either to the federal district court or to the Fifth Circuit Court of Appeals that there was a genuine issue of material fact and it is therefore reasonable to conclude that he could not show otherwise to a state district court. As such, the federal district court would be remanding the case for the sole purpose of requiring the parties to proceed through yet another summary judgment proceeding in state court only to reach the same ultimate result. "Where the remand to state court would be futile. . . the desire to have state courts resolve state court issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources." *Bell v. City of Kellogg,* 922 F.2d 1418, 1424-25 (9th Cir. 1991) (In that case, following dismissal of their federal claims, plaintiffs sought a remand of their state claims. Instead, the district court denied plaintiffs' motion to remand and dismissed plaintiffs' state law claims on the basis of the plaintiffs' failure to comply with a bond posting requirement. In evaluating the plaintiffs' complaints on appeal, although the 9th Circuit believed that the cause should have been remanded, given that the state court would have reached the same conclusion and dismissed plaintiffs' claims, the 9th Circuit concluded that remand would have been futile and therefore it was not an error to have denied the motion to remand). *See also International Primate Protection League v. Administrators of Tulane Educational Fund,* U.S. , 111 S. Ct. 1700, 1709-10, (1991) (wherein this Court recognized the possibility of the futility exception to § 1447(c)).

The Petitioner in this cause fails to present sufficient reasons to justify the granting of his Petition. The facts in this case are not likely to occur with any frequency in the future. Furthermore, a

remand would be futile because Respondents would still be entitled to summary judgment.

V. IN HIS FIRST MOTION FOR REMAND, PETITIONER FAILED TO RAISE THE ARGUMENT THAT REMOVAL IN THIS CAUSE WAS UNTIMELY BASED ON THE ONE-YEAR LIMITATION CONTAINED IN SECTION 1446(b)

Although in his Petition for Writ of Certiorari, Petitioner raises a second question, in the body of his argument he addresses that question only in a footnote. While Respondents agree with Petitioner's statement that the second issue is not worthy of independent review, Respondents will briefly reply to that issue given that the Petitioner has made the argument.

The second issue presented by Petitioner is whether he raised the one-year limitation in his First Motion to Remand. Petitioner concedes that he did not expressly raise this issue and further concedes that he did not cite or otherwise consciously allude to the one-year limitation contained in § 1446(b); however, Petitioner contends that, because the *factual* background discussion contained in his first Motion to Remand reflected that the case had been pending more than a year prior to removal, that should somehow be considered a substitute for actually pleading a non "subject matter jurisdiction" ground for removal. Petitioner, of course, cites no authority for his position; nor could he, since there is no support for this contention either in the statute or the opinions interpreting the statute. Petitioner in effect argues that the federal district court below should have become a partisan in this case and should have raised a procedural defense which the Plaintiff himself had waived.

First, § 1447 is very explicit; it provides that any defect in removal procedure must be raised within 30 days of the date of the removal. It does not provide, nor can it be read as providing, that a party need only allege *facts* from which the district court must then fashion its own reason for remand.

If this Court accepts Petitioner's contentions, then the 30-day requirement contained in § 1446 would be rendered meaningless since it would permit an unlimited time within which to raise belated assaults on the removal so long as there were any facts demonstrating the basis for that argument in the original Motion to Remand.

Moreover, if one accepts Petitioner's view on this point, then, broadly interpreted, any party should be able to rely on the factual basis contained within its pleadings to argue that a district court should have taken notice of a particular potentially available, yet not pled, cause of action, argument or defense. Presumably Petitioner would then agree that Respondent need not have filed its Motion for Summary Judgment herein and that the district court should have raised that defense and granted summary judgment on its own!!

Needless to say, accepting Petitioner's argument would require a district court to represent each litigant and ensure, on its own, that every cause of action, argument or defense that could be claimed by any party based on the facts presented was actually raised. Such quite simply is not permitted in our system of jurisprudence, let alone required by the Federal Rules of Civil Procedure, the applicable statutes or any cases interpreting them.

CONCLUSION

The Fifth Circuit Court of Appeals correctly affirmed the district court's denial of Petitioner's Motion for Remand because the one-year limitation on removal contained in 28 U.S.C. § 1446(b) is a procedural limitation that was waived when Petitioner failed to raise the issue in a motion for remand filed within 30 days of the date of removal.

For the reasons stated, Respondents WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION, respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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**Counsel of Record*

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing instrument have been mailed, postage prepaid, Certified Mail, Return Receipt Requested to all counsel of record on this 30th day of October, 1992.

/s/ ROBERT H. FROST
ROBERT H. FROST

APPENDICES

APPENDIX A — Opinion of the United States Court of Appeals for the Fifth Circuit, 962 F.2d 513 (5th Cir. 1992).

APPENDIX B — Opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, Civil Action No. 4-89-44-E, regarding Respondents' Motion for Summary Judgment.

APPENDIX C — Opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, Civil Action No. 4-89-44-E, relating to Petitioner's Motion for Rehearing of Motion to Remand.

APPENDIX D — Opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, Civil Action No. 4-89-44-E, regarding Petitioner's First Motion to Remand.

APPENDIX E — Identification of Respondent Parent Company and Partially Owned Subsidiaries

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-1351

MARK BARNES,
Plaintiff-Appellant,

v.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,
Defendants-Appellees.

June 8, 1992

EMILIO M. GARZA, Circuit Judge:

During his work on a remodeling project at Dallas/Fort Worth Airport, Mark Barnes was injured after drilling into a high voltage bus duct which was part of the building's electrical system. Barnes filed this personal injury and product liability action in state court against Westinghouse—manufacturer of the bus duct—and others, alleging that their negligence caused his injuries. The case was subsequently removed to federal court, and the district court granted summary judgment for Westinghouse because Barnes did not file suit within the ten-year statute of repose. *See* TEX.CIV.PRAC. & REM. CODE ANN. § 16.009 (West 1986). Finding no error, we affirm.

I

Barnes, an employee of Trinity Contractors, was injured on June 15, 1984 when, during the course of a remodeling project, he drilled into a pre-existing electrical bus duct [1] manufactured by Westinghouse, and suffered, among other things, disfiguring burns to approximately seventy percent of his body. The bus duct which is the basis for Barnes' complaint was designed and manufactured by Westinghouse during 1972-73 for permanent installation into Dallas/Fort Worth airport, including the equipment room above American Airlines Terminal 3E, where Barnes was injured.[2]

Barnes filed his Original Petition against Westinghouse and others in state district court in Tarrant County, Texas, on July 23, 1985. Approximately four years later, on January 12, 1989, Westinghouse removed Barnes' suit to federal court alleging diversity jurisdiction under 28 U.S.C. § 1332. Barnes promptly moved to remand to state court, and the district court denied his motion.

Subsequently, Westinghouse filed a motion for summary judgment, asserting that Barnes' action was barred by the Texas ten-year statute of repose—limiting actions for liability resulting from "improvement[s]" to real

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[1] Bus duct is a metal-encased structure containing a number of rounded edge "bus bars" which transport electrical power in commercial buildings. The bus bars are enclosed within housing constructed of 14-guage and 16-guage steel. By transporting and distributing electricity throughout commercial buildings, the bus duct is meant to facilitate efficient power distribution.

[2] Specifically, the bus duct was a "POW-R-WAY" bus duct—that is, a duct specifically manufactured for permanent installation into particular structures according to design specifications submitted to Westinghouse. It was in conformity with the plans and specifications submitted by Ling Oliver O'Dywer Electric, Inc., the electrical subcontractor who installed the bus duct at the airport. The construction of improvements of Terminal 3E, including the installation of the bus duct, was substantially completed by January 31, 1974.

property to ten years from "substantial completion" of that improvement. TEX.CIV.PRAC. & REM.CODE ANN. § 16.009 (1986).[3] Approximately a year after his motion to remand was denied, Barnes filed a motion for rehearing. The district court denied Barnes' motion for rehearing, and granted Westinghouse's motion for summary judgment. Barnes appeals the judgment for Westinghouse, arguing that his motion to remand should have been granted and that summary judgment was improper because the bus duct was a component part of an improvement and, therefore, outside the state of repose.

II

A

Barnes argues that the district court erred in denying his motion for rehearing of his motion to remand on the grounds that the one-year limitation on removal contained in 28 U.S.C. § 1446(b)[4] is jurisdictional[5] and

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[3] The relevant portion of section 16.009 is quoted in its entirety *infra* at Part B.

[4] 28 U.S.C. § 1446(b) provides:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

[5] Specifically, Barnes contends:

> "[T]hat the district court erred in denying his motion for rehearing of motion for remand because Westinghouse removed the suit to federal court over three years after the suit was filed in state district court in violation of the one year limitation on removal contained in section 1446(b), and the district court therefore lacked subject matter jurisdiction and should

thereby may be raised at any time prior to judgment pursuant to 28 U.S.C. § 1447(c).[6] We disagree.

Barnes filed his Sixth Amended Original Petition—a petition naming for the first time completely diverse defendants—on December 16, 1988. Less than thirty days later, Westinghouse filed a petition for removal to the United States District Court for the Northern District of Texas. *See* 28 U.S.C. § 1441. Within thirty days of filing, Barnes filed a motion to remand, claiming that Westinghouse sought affirmative relief in the state district court after the case became removable, thereby waiving the opportunity to rightfully remove the case. The district court denied Barnes' motion to remand.

Over a year later, in September 1990, Barnes filed a motion for rehearing of his motion to remand. For the first time, Barnes argued that a case cannot be removed to federal court on the basis of diversity more than one year after commencement of the action. *See* 28 U.S.C. § 1446(b).[7] None of the parties dispute that Westing-

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have remanded the case to the 48th District Court of Tarrant County, Texas."

Brief for Appellant at 14, *Barnes v. Westinghouse Electric Corporation*, No. 91-1351 (5th Cir. filed June 17, 1991) ["Appellant's Brief"]. Barnes confuses removal jurisdiction with subject-matter or original jurisdiction. *See infra* notes 8-10 and accompanying text.

[6] 28 U.S.C. § 1447(c) provides in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

[7] Pursuant to an amendment enacted November 19, 1988, section 1446(b) now states that a case may not be removed on the basis of jurisdiction conferred by section 1332 more than one year after commencement of the action. Section 1447(c) of Title 28 states that a motion to remand a case on the basis of a defect in removal

house removed the case more than one year after the commencement of the action. The district court, however, denied Barnes' motion for rehearing, reasoning that the removal procedures set forth at 28 U.S.C. §§ 1446(b) and 1447(c) were not jurisdictional. Therefore, the district court reasoned that if a case was in state court for over a year, and then removed pursuant to 28 U.S.C. § 1332, failure to comply with the thirty-day requirement imposed by section 1447(c) results in a waiver of a plaintiff's rights to object to removal defects resulting from noncompliance with section 1446(b). Because Barnes waited over twenty months to move for rehearing on his motion to remand, based on Westinghouse's failure to remove within one year of the original action, the district court found that Barnes had waived his right to object pursuant to section 1447(c).

We are not persuaded by Barnes's arguments that section 1446(b) is jurisdictional in nature, and therefore may be raised at any time. The language of the statute belies Barnes' contentions and indicates that sections 1446(b) and 1447(c) are procedural provisions.[8] As we stated in *Baris v. Sulpicio Lines*, "this court has had little difficulty in distinguishing between removal jurisdiction,[9] on the one hand, and original or subject matter

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procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).

The amendments to sections 1446(b) and 1447(c) contain no effective date. Therefore, the effective date of these sections is the date the Act was enacted, which is November 19, 1988. *See In re Shell Oil Co.*, 932 F.2d 1523, 1526 (5th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992) (effective date of amendment to section 1447(c) is November 19, 1988, and in most cases, it applies to cases pending on this date); *see also In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir.1991) (companion case to *Shell, supra*); *Greer v. Skilcraft*, 704 F.Supp. 1570, 1582-83 (N.D.Ala. 1989) (en banc) (effective date of amendment to section 1446(b) is November 19, 1988, and it applies to cases pending on this date).

[8] *See supra* notes 4 and 6.

[9] *See* 28 U.S.C. § 1441 ("Actions removable generally").

jurisdiction,[10] on the other hand." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544 (5th Cir.), (footnote omitted) *cert. denied*, —— U.S. ——, 112 S.Ct. 430, 116 L.Ed.2d 449 (1991) (citations omitted); *see also In re Shell Oil Co.*, 932 F.2d 1518, 1522-23 (5th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992) (noting that defects in removal procedure include all non-jurisdictional defects, and concluding that plaintiffs waived any non-jurisdictional grounds for remand existing at time of removal by not moving to remand within 30 days of notice of removal); *see also In re Shell Oil Co.*, 932 F.2d 1523 (5th Cir.1991) (companion case to *Shell, supra*).

We have noted that the word "procedural" in section 1447(c) refers to "any defect that does not go to the question of whether the case originally could have been brought in federal district court. . . ." *Baris*, 932 F.2d at 1544; *see also* H.R.REP. No. 100-889, 100th Cong., 2d Sess. 7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032-33 (noting 1988 changes to sections 1446(b) and 1447(c) and discussing removal procedure). This distinction between removal jurisdiction and subject matter jurisdiction is applicable to section 1446(b), which speaks of the removal of cases not more than one year after the commencement of the action. We previously have noted that "[t]he time limitation for removal is not jurisdictional; it is merely 'modal and formal and may be waived.'" *Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 n. 6 (5th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1587, 113 L.Ed.2d 651 (1991) (citations omitted). Because Barnes did not move for rehearing on his motion to remand based on a procedural defect until approximately twenty months after Westinghouse's removal, we find that he waived his opportunity to call this procedural defect to the district court's attention.

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[10] *See, e.g.*, 28 U.S.C. §§ 1331 ("Federal question" jurisdiction) and 1332 ("Diversity of citizenship" jurisdiction).

B

Barnes also challenges the district court's conclusion that the bus duct was an improvement under section 16.009 of the Texas Civil Practice and Remedies Code, that no genuine issues of fact existed, and that Westinghouse was entitled to summary judgment as a matter of law. Barnes argues that the district court should not have granted Westinghouse's motion for summary judgment because the bus duct was merely a component part of an improvement and, therefore, outside the statute of repose. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 16.009 (West 1986). We find Barnes' contentions without merit.

Section 16.009 provides in relevant part:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

Id. The term improvement, set forth in section 16.009, has been held to include "all additions and betterments to the freehold." *Dubin v. Carrier Corp.*, 731 S.W.2d 651, 653 (Tex.App.—Houston [1st Dist.] 1987) (citation omitted), *appeal after remand*, 798 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd by agr.). An improvement can be anything that permanently enhances the value of the premises, and it can even be something easily removable provided that it is attached and intended to remain permanently as part of the building. *See Dedmon v. Stewart-Warner Corp.*, 950 F.2d 244, 247 (5th Cir.1992), *citing Ablin v. Morton Southwest Co.*, 802 S.W.2d 788, 791 (Tex.App.—San Antonio 1990, writ denied) and *Dubin I*, 731 S.W.2d at 654. However, manufacturers of component parts of an improvement do not come within section 16.009's statutory language.

See Conkle v. Builders Concrete Prods. Mfg. Co., 749 S.W.2d 489, 491 (Tex.1988) (citation omitted). And, a materialman who does no more than manufacture or supply materials does not benefit from—section 5536a, § 2, the predecessor statute to—section 16.009.[11] *Reddix v. Eaton Corp.*, 662 S.W.2d 720, 724 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.) (citations omitted).

Barnes relies heavily on *Conkle* to support his argument that Westinghouse manufactured merely a component part of an improvement. In *Conkle* a worker at a concrete plant was killed when he got into a bin of a concrete batch plant to remove some objects that were trapped there. His parents sued Dillon Steel, the manufacturer of the concrete batch plant. The trial court granted summary judgment for Dillon Steel on the grounds that the Conkles' claim was barred by section 16.009, applicable to claims against persons who construct improvements to real property. The Texas Supreme Court held that summary judgment evidence raised fact issues whether the machinery in which Douglas died was an improvement to real property and whether Dillon Steel manufactured the entire unit or component parts only. The court emphasized that:

> Roy J. Dillon admitted that Dillon Steel did not manufacture or construct the mixer apparatus which is joined with the bins and hoppers to form a concrete batch plant. Thus, there was testimony that Dillon Steel had not manufactured the entire structure. Further, there was evidence that the plant is actually portable. The bins were first constructed at Dillon's plant and the moved to the batch plant's original location on the property of Lok Rok Corporation. It was only later that the plant was even placed on Builders' property.

Conkle, 749 S.W.2d at 491.

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[11] Tex.Rev.Civ.Stat.Ann. art. 5536a, § 2 (West Supp.1982-83) is codified as amended in § 16.009.

Barnes's reliance on *Conkle* is misplaced. Section 16.009 requires only that the item in question be "an improvement to real property." *See Rodarte v. Carrier Corp.*, 786 S.W.2d 94, 95 (Tex.App.—El Paso 1990, writ dism'd).[12] As the district court noted in this case, the bus duct was permanently affixed within the structure of Terminal 3E as part of an overall electrical system affixed to the terminal.[13] Westinghouse manufactured the bus duct for permanent installation into the terminal. Thus, the bus duct was an addition and betterment to

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[12] In *Rodarte*, the court held that heater-air conditioner unit which had electrocuted Rodarte was an improvement to real property. The *Rodarte* court noted the unit was permanently connected to the premises by its connection to the duct work and that it was blocked into a corner of a building by other units which were permanently attached to the structure. Thus, Carrier Corporation was a manufacturer of an "improvement to real property." Because the unit was manufactured and installed more than ten years before the suit was filed, the court held that the wrongful death suit barred by section 16.009.

[13] Barnes points to the testimony of Dr. Gary Richetto, a Westinghouse expert, to support his contention that the bus duct "is merely a component of the improvement in question." Appellant's Brief at 16. Dr. Richetto testified that he believed the various sections of busway were individual component parts of an overall electrical system. We do not find his assertions persuasive or enough to defeat summary judgment, because Westinghouse manufactured the entire bus duct system—an improvement to real property. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986) (mere evidence of a scintilla of evidence in support of plaintiff's position is insufficient to defeat summary judgment). And, as Westinghouse indicates, Dr. Richetto apparently did not examine the bus duct, but based his testimony upon a review of literature concerning the product.

Barnes also asserts that Westinghouse did not install the bus duct, and Westinghouse concedes this fact in its brief. This point will not defeat summary judgment. *See Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870, 872 (Tex.Civ.App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (manufacturer of elevator would be a person performing or furnishing construction of the elevator, even though it did not install it in the building).

the freehold of Terminal 3E. *Id.* Barnes' argument that Westinghouse was the mere manufacturer of component parts is not persuasive because Westinghouse manufactured the entire bus duct system. *See Dubin v. Carrier Corp.*, 798 S.W.2d 1, 2 (Tex.App.—Houston [14th Dist.] 1990, writ dism'd by agr.) (defendant Williams, responsible for manufacturing and designing wall heater unit, is entitled to statutory protection under section 16.009 because Williams both made a portion of the unit and also manufactured the entire assembly). Westinghouse, as an entity that constructed an improvement within the meaning of section 16.009, is not a mere manufacturer of component parts and is, therefore, entitled to repose under section 16.009.

III

Accordingly, we AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

VS.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION

MEMORANDUM OPINION AND ORDER

[Filed Feb. 8, 1991]

The Court now considers defendant's motion for summary judgment and plaintiff's response thereto. After a thorough review of the issues and applicable law, the Court makes the following determination.

FACTUAL SUMMARY

Plaintiff, Mark Barnes, originally brought this action in the 48th Judicial District Court of Tarrant County, Texas, and said action was subsequently removed to this Court following the dismissal of all non-diverse defendants in the state court proceeding. The Court, therefore, has jurisdiction over this cause pursuant to 28 U.S.C. § 1332.

In summary, plaintiff alleges that while he was working at D/FW Airport in Terminal 3E, he attempted to drill into a structure that he allegedly believed to be ordinary I-beam, which in fact was electrical busway.

Plaintiff contends that as a result of the lack of warning, he drilled into the busway whereby he sustained severe electrical burns and injuries. In plaintiff's sixth amended original petition, plaintiff asserts the following:

(1) that Westinghouse [1] failed to affix proper and adequate warnings to the subject bus duct;

(2) that Westinghouse breached express and/or implied warranties applicable to the subject bus duct;

(3) strict products liability with respect to the design, manufacture, and construction of the subject bus duct; and

(4) general allegations of negligence with respect to the design, manufacture, and construction of the subject bus duct.

The parties stipulate that the plaintiff was an employee of Trinity Contractors and was at work in the course and scope of his employment for such employer at the time of the accident in question on or about June 15, 1984. The parties further stipulate that the section of busway or bus duct involved in the accident on or about June 15, 1984 was designed, manufactured, and marketed by the Westinghouse Electric Corporation.

The following facts are undisputed:

The bus duct described in plaintiff's sixth amended original petition is located in the machine room above Terminal 3E and was manufactured by Westinghouse

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[1] Westinghouse Electric Supply Company, also referred to as "WESCO' in plaintiff's sixth amended original petition, is an unincorporated business unit of Westinghouse Electric Corporation. Additionally, "WESCO DALLAS," as named in plaintiff's sixth amended original petition, is a branch office of Westinghouse Electric Supply Company. Neither WESCO Dallas nor Westinghouse Electric Supply Company are independent corporate entities. Thus, each of the claims asserted in plaintiff's sixth amended original petition are claims against Westinghouse Electric Corporation.

during 1972-1973. The installation of the bus duct was substantially completed by Ling Oliver O'Dwyer Electric, Inc., on or prior to January 31, 1974, which is in excess of ten years prior to the initiation of this action.

DISCUSSION

Defendant Westinghouse claims that plaintiff's lawsuit is barred by the Texas Statute of Repose which is codified at Texas Civil Practice & Remedies Code § 16.009. Section 16.009 provides, in relevant part, as follows:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than ten (10) years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

In its motion for summary judgment, Westinghouse relies on *Rodarte v. Carrier Corporation*, 786 S.W.2d 94 (Tex. App.—El Paso 1990, n.w.h.) for the proposition that manufacturers of products affixed to realty are persons who construct or repair improvements to real property, within the meaning of the Statute of Repose. In *Rodarte*, the plaintiff was attempting to repair a heater/air conditioning unit, designed, manufactured and marketed by the Carrier Corporation. In the process, plaintiff was electrocuted and his heirs brought suit for wrongful death alleging that "design and marketing defects were the producing cause of his death." *Id.* at 95. There was no dispute that the unit had been manufactured and installed more than 10 years before the suit was filed. In its defense, Carrier relied upon the Statute of Repose.

The plaintiff in *Rodarte* argued that the statute should not apply to Carrier because Carrier was a manufacturer and not the installer or servicer of the unit. The plaintiff

also argued that the unit was merely a "component part of a greater system and was not in itself an improvement." The Court, however, rejected plaintiff's arguments stating: "[t]he statute only requires that the particular item in question be "'an improvement to real property.'" Referring to *Dubin v. Carrier Corporation*, 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987, no writ), the Court in *Rodarte*, reiterated that an "improvement" comprehends all additions and betterments to the freehold. *Rodarte* 786 S.W.2d at 95.

Describing the subject heating/cooling unit, the Court in *Rodarte* stated that "[it] is permanently connected to the premises by its connection to the duct work and is blocked into a corner of a building by other units which are permanently attached to the structure." *Id.* at 96. In the case at bar, the Court finds from the evidence before the Court, as established in the uncontroverted affidavits of James L. Mertz and Robert G. Towne, that the bus duct was an improvement as contemplated by Section 16.009. Stated differently, the bus duct in question was an addition and betterment to the freehold of Terminal 3E. See *Dubin v. Carrier Corporation*, 731 S.W.2d 651. In the aforementioned affidavits, both Mertz and Towne state that the bus duct was "permanently affixed within the structure housing Terminal 3E." The Court finds that the bus duct, though part of an overall electrical system, was permanently affixed to the system and became an improvement to real property. Plaintiff provides no controverting evidence that the bus duct is not an improvement. Plaintiff merely argues that the bus duct should be considered a component part to the overall electrical system and should therefore not be entitled to protection under Section 16.009. The Court, however, finds pursuant to *Rodarte*, that the distinction between component parts are not important for the Court's determination of whether the instant bus duct is an improvement to real property under 16.009.

Plaintiff's alternative argument is that Section 16.009 does not operate to exclude those causes of actions which are premised on inadequate warning and defective design. Although it stated in dicta, the Court in *Rodarte*, specifically addressed this issue. There the Court stated that the "statute applies to an action arising out of a defective or unsafe condition in the construction of the unit and all of the claims against the manufacturer fall within those provisions of the statute." *Id.* The plaintiff correctly points out that this Court need not follow opinions of intermediate appellate courts when the federal district court has reason to believe that the highest appellate court of the state in which it sits would decide the issue at hand differently than previously decided by the intermediate appellate courts. *See Farina v. Southwestern Bell Media Inc.*, 658 F. Supp. 826, 828 n.1 (S.D. Tex. 1987). In *Farina*, the Court stated in note 1 that the "Federal Courts are not bound by the rulings of intermediate Texas appeals courts but must make an *Erie*-guess and rule as they believe that the Texas Supreme Court would rule. *Id.* In light of *Farina*, the Court finds that it is reasonable to believe that the Texas Supreme Court would fashion relief in the same manner as the court in *Rodarte*.

In summary, the Court finds that the bus duct is an improvement under Section 16.009 of the Texas Civil Practice and Remedies Code. The Court further finds that actions brought against manufacturers for alleged violations of inadequate warning and defective design are contemplated by the application of Section 16.009. The Court further finds that there exists no genuine issue of material fact and summary judgment is therefore appropriate. Accordingly, the Court GRANTS defendant's motion for summary judgment as to all claims asserted by plaintiff against defendant Westinghouse and its wholly owned subsidiaries. Plaintiff shall take nothing by this lawsuit and each party shall bear their own

costs. A judgment consistent with this opinion will be executed herewith.

Signed this 7th day of February, 1991.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

vs.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION

JUDGMENT

[Filed Feb. 8, 1991]

This action came on for decision on defendants' motion for summary judgment before the Court, Honorable Eldon B. Mahon, U.S. District Judge, presiding, and the issues having been duly considered and an opinion having been rendered, it is ORDERED and ADJUDGED that plaintiff take nothing by his lawsuit and that the parties bear their own costs of action.

Signed this 7th day of February, 1991.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

vs.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION

ORDER

[Filed Nov. 21, 1990]

The Court now considers plaintiff Mark Barnes' motion for rehearing on motion to remand to which the defendants Westinghouse Electric Corporation, Westinghouse Electric Supply Company, Wesco Dallas, and Wesco, a division of or wholly-owned subsidiary of Westinghouse Electric Company, have responded. After a thorough review of the issues and applicable law, the Court makes the following determination.

This case was originally filed in the 48th Judicial District Court of Tarrant County, Texas in 1985. In his original petitions in state court, plaintiff sued various non-diverse defendants. In December 1988 all non-diverse defendants were dismissed from the lawsuit and plaintiff filed his sixth amended petition which created diversity

of citizenship for the first time. On or about January 12, 1989, Westinghouse removed the above-captioned cause to this Court. Thereafter, on January 25, 1989, plaintiff filed his motion for remand, which is the subject of the plaintiff's instant motion for rehearing filed on September 21, 1990.

In his motion for rehearing, plaintiff argues that this Court lacks subject matter jurisdiction over this cause as a result of the removal statute set out in the Judicial Improvements and Access to Justice Act, Public Law No. 100-702, 102 Stat. 4642, which is found in the amended 28 U.S.C. § 1446(B). Defendants argue that the amended removal statute does not create a jurisdictional requisite, but rather a procedural one. Defendants further argue that the plaintiff waived his right to assert the procedural defect when plaintiff waited some 20 months to file this instant motion to remand.

1988 AMENDMENT-SECTION 1446(b)

Prior to the 1988 amendment, Section 1446(b) provided for removal within 30 days after receipt by the defendant of an amended pleading or other paper that gave defendant notice that the case is removable. Therefore, removal under the previous statute could occur at any time as long as there existed a basis for removal. The amendment in 1988 to Section 1446(b), however, limited a party's right to removal of those actions whose jurisdiction is based solely on diversity. As amended by the 1988 Act, 28 U.S.C. § 1446(b) reads (in pertinent part with emphasis supplied):

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, *except that a case may not*

> *be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

Plaintiff argues that the new 1 year limitation acts as a non-waivable jurisdictional bar. In support of his proposition, plaintiff cites to *Foiles By Foiles v. Merrell Nat. Laboratories*, 730 F. Supp. 108 (N.D.Ill. 1989). In *Foiles*, the case was removed on June 22, 1988 following the dismissal of the non-diverse defendants, and the plaintiff filed for remand on August 25, 1989, some 60 days later. Notwithstanding the plaintiff's failure to argue that the new amendment created jurisdictional limitations, the *Foiles* court held that the 1 year limitation is a jurisdictional one and remanded the case to state court.

At opposite with the holding in *Foiles* is the holding in *Leidolf By Warshafsky v. Eli Lilly and Co., Inc.*, 728 F. Supp. 1383 (E.D.Wis. 1990). In *Leidolf*, the court specifically found that the removal defects arising from § 1446(b) are procedural and not jurisdictional. The *Leidolf* court noted that where a case is improperly removed under 1446(b), the plaintiff may waive his right to remand if he fails to comply with the 30 day provision of § 1447(c). As amended by the 1988 Act, 28 U.S.C. § 1447(c) reads in pertinent part as follows:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).

Explaining its analysis, the court in *Leidolf* cited to *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980, where the court stated that "[t]he statutory time limit for removal petitions is merely a formal and modal requirement and is not jurisdictional." [1]

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[1] *See also Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543 (N.D.Cal. 1989). *See generally Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989).

Having no binding authority on this issue, this Court must make its determination from analogy to the removal procedures prior to the 1988 amendment. The majority of the cases involving removal prior to the 1988 amendment agree that the removal procedure restrictions and limitations are procedural in nature and do not create jurisdictional requisites.[2] Therefore, this Court finds that the 1988 amendment to § 1446(b) does not create a jurisdictional requirement barring all actions in the district court where the case was removed pursuant to § 1332 and remained in state court for over one year. Failure to comply with the 30 day requirement imposed by § 1447(c) creates a waiver of the plaintiff's rights to object to any removal defects brought upon by defendant's failure to comply with § 1446(b).

Defendants, however, do not have clean hands in this case. At the time of removal, defendants removed this cause contrary to the newly established removal procedures under § 1446(b). On the other hand, plaintiff waited nearly 20 months to bring this motion to rehear plaintiff's motion to remand. Plaintiff's instant motion, however, is not a "rehearing," but rather a new motion to remand, stating new reasons why this Court should remand this cause to state court.[3] The Court has reviewed its previous ruling on plaintiff's original motion to remand and finds no error.

Plaintiff's hands are likewise dirty as a result of failing to assert the proper grounds for remand in January 1989 and then waiting 20 months to bring this renewed motion to remand. Since the determination of plaintiff's original motion to remand in February 1989, both parties have

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[2] *See Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987); *Grubbs v. General Electric Corp.*, 405 U.S. 699 (1972).

[3] In his original motion to remand, plaintiff argued that because the defendants took advantage of the state forum for some three and one half years, defendants should be barred from removing the cause to the federal court on the eve of trial.

engaged in extensive preparation of this lawsuit. Defendants filed a motion for summary judgment on June 7, 1990 and plaintiff responded. The Court held a pretrial conference on July 16, 1990 on this cause and heard informal arguments on defendants' motion for summary judgment. The final reply on the motion for summary judgment was filed on July 27, 1990. It was not until the Court began to deliberate on defendants' motion for summary judgment that plaintiff renewed his motion to remand. Plaintiff argues that neither party had the benefit of the amendment to § 1446(b) as it had not made its way into the libraries of the respective law firms. While this is probably true, the Court cannot enforce rules and laws only upon those that have read them. Once the amendment became enacted, all parties were given notice. While defendants had notice of the amendment, plaintiff's failure to comply with § 1447(c) prevents this Court from curing such defect. The removal defect is not a jurisdictional defect, and because this Court would have had jurisdiction over this matter had it been originally filed in this Court, the Court must deny plaintiff's renewed motion to remand.

Accordingly, the Court DENIES plaintiff's motion for rehearing on motion to remand. Since the Court stayed its ruling on defendants' motion for summary judgment and said motion is now ripe for ruling, an opinion will be forthcoming.

Signed this 20th day of November, 1990.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

vs.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*

ORDER

[Filed Feb. 10, 1989]

The Court has agreed to consider Plaintiff Mark Barnes' petition for removal on an expedited basis. The petition was joined on February 6, 1989, and the matter is ripe for resolution.

Based on the removal record developed in this cause, the Court finds that Defendant Westinghouse Electric Corporation timely removed this action from state court when the last nondiverse defendant was dismissed and complete diversity of citizenship was created between the remaining plaintiff and defendant. After diversity was complete, Westinghouse removed this action within the 30 day period prescribed by the removal statute, title 28, section 1446 of the United States Code.

Prior to the time this action became removable, a joint motion was filed by the defendants, including Westinghouse, in state court for an independent medical examination of Plaintiff Barnes. Barnes countered in state

court with a motion for protective order. After this case became removable, a hearing was held in the state court on the plaintiff's motion for protective order and Westinghouse's request for an independent medical examination. Westinghouse's appearance at this discovery hearing was preliminary in nature. Nothing in the record before this Court indicates that Westinghouse's appearance at the discovery hearing constituted a waiver of Westinghouse's right to remove or an agreement on the part of Westinghouse to submit the merits of case to the state court for a determination. Short of proceeding to an adjudication of the case on its merits, defensive actions in state court do not waive the defendant's right to remove. *See, e.g., Gore v. Stenson*, 616 F. Supp. 895, 897-98 (S.D. 1984) ("An intent to waive the right to remove . . . must be clear and unequivocal, and the waiving party's action must be inconsistent with his right to remove.").

Accordingly, Plaintiff Barnes' motion to remand is DENIED.

Signed this 9th day of February, 1989.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

Name	Incorporated In
Westinghouse Electronic Systems Ventures, Inc.	
Integrated Sensors, Inc.	California
Jerry Thompson & Associates, Inc.	Maryland
Westinghouse Holdings Corporation	
Westinghouse Electric S.A. (WELSA)	
Ace, Ltd.	Bermuda
Airship Industries, Ltd.	United Kingdom
Contadores Electricos, C.A. (CONTELECA)	Ecuador
Elektrik Techizati Imalti Tesisati, A.S.	Turkey
Hyosung Heavy Industries, Ltd.	Korea
Industria Electrica de Mexico, S.A.	Mexico
Industria IEM, S.A. de C.V.	Mexico
Industria etTechnologie de la Machine Intelligentie (ITMI)	France
ISCOSA Industries and Maintenance, Ltd.	Saudi Arabia
London Jazz	United Kingdom
Lusambo Pty Ltd.	Papua New Guinea
Pwr Power Projects, Ltd.	United Kingdom
Reftrans, S.A.	Spain
Societe Generale de Travaux Electriques (SGTE)	France
WBI Advanced Technology	India
Samaksama Electrics Pty. Ltd.	India
Westinghouse Asia Controls Corporation (WACC)	Philippines
Cyclotron Realty & Investment Corp.	Philippines
Westinghouse Electric Australia Holdings Limited (WEAHL)	Australia
Email Westinghouse Pty. Ltd.	Australia
Email Westinghouse Properties	Australia
Westinghouse Electrique France, S.A.	
Societe Generale de Travaux Electriques (SGTE)	France
Westinghouse Electric Australia Holdings Limited (WEAHL)	Australia
Westinghouse Vienna Service Company, GmbH	Austria

APPENDIX E

THE PARENT COMPANY OF RESPONDENTS IS WESTINGHOUSE ELECTRIC CORPORATION

THE PARTIALLY OWNED SUBSIDIARIES OF WESTINGHOUSE ELECTRIC CORPORATION ARE AS FOLLOWS:

Name	Incorporated In
ADEPT Technologies	California
AEG-Beteiligunsgesellschaft MBH	Germany
AEG-Westinghouse Transportation Systems, Inc.	Delaware
AWS Ansaldo, SpA	Italy
CEEC Holdings Incorporated	Delaware
CEEC Investments Incorporated	Delaware
Challenger Electrical Equipment Corp.	Delaware
CEEC Investments Incorporated	Delaware
CEEC Holdings Incorporated	Delaware
Challenger Electrical Equipment Corp.	Delaware
C & K, Ltd.	United Kingdom
Computer Aided Training Company, Incorporated	Pennsylvania
Cypher Communications Technology, Inc.	Maryland
Edge Emitter Technology, Inc.	Delaware
Enwesa Servicos, S.A.	Spain
Eregli Demir ve Celik Fabrikalori, A.S.	Turkey
Escorts, Ltd.	India
Gamma Metrics	California

Name	Incorporated In
Goldstar Vacuum Aparatus Company	Korea
Hellenia Business Development	Greece
Industrias IEM, S.A. de C.V.	Mexico
Infrared Fiber Systems, Inc.	Delaware
Inova Microelectronics, Inc.	California
Integrated Communication Systems Inc.	Georgia
Knoll Group, Inc. (The)	
Corporate Interiors, Inc.	Missouri
Gaviform	Brazil
Knoll International (SEA) Ltd.	Hong Kong
Knoll Hong Kong PTE Ltd.	Hong Kong
Knoll Malaysia Sdn. Bvd.	Malaysia
Knoll Muebles y Sistemas S.A.	Columbia
Lyn (PTE) Limited	Singapore
Topform Postforming (PTE) Ltd.	Singapore
Knoll International Japan Ltd.	Japan
Lor-West, Ltd.	Bermuda
Mecanica Pesada, S.A.	Brazil
Micros Systems Inc.	Maryland
Modelpol	Poland
Photocomm, Inc.	Arizona
Powerex, Inc.	Delaware
Project Funding Corporation	Delaware
Serratosa & Castells, S.A.	Uraguay

Name	Incorporated In
Siam Toracato de Tella, Ltd.	Uraguay
Speech Plus	California
Texas PFC, Inc.	Delaware
Thermo King-Frigera, sr.o	Czechoslovakia
Theta J Corporation	Massachusetts
Turbine Metal Technologies, Inc.	California
United Western Technologies Corp.	Delaware
Vektron S.A.	Mexico
WB Bottling Corporation	Delaware
W. S. Industries (India) Ltd.	India
Westinghouse-Airship Industries, Inc.	Delaware
Westinghouse Anniston Environmental Operations Company, Inc.	Delaware
Westinghouse Broadcasting Company, Inc.	
Group W AVN Partner, Inc.	Delaware
Group W Radio, Inc.	Delaware
FuturImage, S.A.	France
Westinghouse Pictures, Inc.	Delaware
Westinghouse Communications, Inc.	
Harbinger*EDI Services, Inc.	Georgia
Westinghouse de Venezuela, S.A. (VENWESA)	
Westinghouse Electro Metalurgicas C.A. (WEMCA)	Venezuela
Westinghouse do Brasil S.A. (WEBSA)	Brazil
Westinghouse do Amazonas, S.A.	Brazil

CERTIFICATE OF SERVICE

This is to certify that copies of Respondents' Brief have been mailed, postage prepaid, certified mail, return receipt requested, to counsel for Petitioners/all parties required to be served: Paul M. Smith of Klein, Farr, Smith & Taranto, 2550 M. Street, N.W., Washington, D.C. 20037, telephone 202/775-0184, Richard Warren Mithoff, Esq., Mithoff & Jacks, Penthouse, One Allen Center Houston, Texas 77002, 713/654-1122 on this 30th day of October, 1992.

ROBERT H. FROST